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| 14. ABSTRACT The international community established the Geneva Conventions with the intent of protecting individuals not engaged, or having ceased to participate in armed conflict. Unfortunately, armed conflicts of the twenty-first century appear very different from those of the previous century. More civilians are used in support of military operations than ever before in the history of the United States. The authors of the Geneva Conventions could never have envisioned the battlefield of the twenty-first century with its cyberspace domain, Unmanned Aerial Vehicles (UAV), and civilian workforce that outnumbers the armed forces. This study does not seek to portray the violation of any domestic or international law, but merely illustrate that the defining lines between combatant and civilian are not as clear as they once were, and that perhaps the line will fade away altogether if appropriate actions are not taken by the United States or the international community. | | | | | |
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MASTER OF MILITARY STUDIES

TITLE:

THE BLURRING OF LINES BETWEEN COMBATANTS AND CIVILIANS
IN TWENTY-FIRST CENTURY ARMED CONFLICT

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Executive Summary

Title: The Lawful Combatant: The validity of the Geneva Convention in 21st century armed conflict

Author: Mr. Nicholas Sims

Thesis: The increased roles and responsibilities of civilians in armed conflicts dangerously blurs the lines between “civilians” and “combatants”, thus questioning the validity of the Geneva Convention’s definition of a “lawful combatant” in the twenty-first century.

Discussion:

The United States has leveraged civilians in armed conflict since the American Revolution in 1775. Civilians generally provided goods and services such as production, transportation, and engineering services. Subsequently, the extensive mobilization requirements of World War I cultivated an interdependent relationship between the United States government and private industry as never seen before. After numerous wars and countless atrocities against innocent civilians, the international community established the Geneva Conventions with the intent of protecting individuals not engaged, or having ceased to participate in armed conflict. Unfortunately, while the nature of war has not changed in the twenty-first century, the characteristics of war have due to new technological feats and greater capabilities. Consequently, armed conflicts of the twenty-first century appear very different from those of the previous century. More civilians are used in support of military operations than ever before in the history of the United States. The authors of the Geneva Conventions could never have envisioned the battlefield of the twenty-first century with its cyberspace domain, Unmanned Aerial Vehicles (UAV), and civilian workforce that outnumbers the armed forces. This study does not seek to portray the violation of any domestic or international law but merely illustrate that the defining lines between combatant and civilian are not as clear as they once were and that perhaps the line will fade away altogether if appropriate actions are not taken by the United States or the international community.

Conclusion: With the blurring of lines between combatant and civilian, the armed forces must review their use of civilians as it pertains to international law and, the Geneva Conventions must be updated or risk losing its validity.

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THE OPINIONS AND CONCLUSIONS EXPRESSED HEREIN ARE THOSE OF THE INDIVIDUAL STUDENT AUTHOR AND DO NOT NECESSARILY REPRESENT THE VIEWS OF EITHER THE MAINE CORPS COMMAND AND STAFF COLLEGE OR ANY OTHER GOVERNMENTAL AGENCY. REFERENCES TO THIS STUDY SHOULD INCLUDE THE FOREGOING STATEMENT.

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INTRODUCTION

These increased roles and responsibilities of civilians in armed conflicts dangerously blurs the lines between “civilians” and “combatants”; thus questioning the validity of the Geneva Convention’s definition for a “lawful combatant” in the twenty-first century. Military organizations throughout the world have leveraged civilians in armed conflicts since 500 B.C. and the United States has followed suite.¹ Dating back to the American Revolution (1775-1783), civilians provided the Continental Army with goods and services such as production, transportation, and engineering services.² Subsequently, between the Mexican War (1846-1848), the American Civil War (1861-1865) and the Spanish-American War (1898), the War Department spent an additional \$78 million dollars on civilian services tailored towards logistical functions. Unfortunately, corruption plagued the contractual process, and the United States government received goods and services lacking in quality and below acceptable standards. Corruption became so prevalent, that Congress had to pass legislation for additional government oversight of contracted services. Unfortunately, the additional government oversight did very little to curb corruption. In an effort to streamline and improve the reliability of the United States military’s logistics capabilities, the United States military attempted to wean itself of its dependency on civilian contractor support, but failed due to the advent of World War I (1914-1918). In fact, the extensive mobilization requirements of World War I cultivated an interdependent relationship between the United States government and private industry as never seen before. As the 20th century progressed, the interdependent relationship between the United States government and private industry was no longer exclusive to periods of armed conflict, but rather, an enduring relationship born of necessity because of the vast expansion of technological capabilities.³

The application of science to warfare created a demand for experienced engineers and technological ingenuity traditionally limited in a military organization, and resulted in an increase of civilian support to armed conflict.⁴ Additionally, the Department of Defense concluded that the use of civilians to perform non-combat activities would free military personnel for combat.⁵ As a result, operations in Iraq (2003-2011) and Afghanistan (2001-ongoing) saw the greatest use of civilian contractors with semi-military/support responsibilities that some argue are inherently governmental functions under the Federal Activities Inventory Reform act of 1998 (the FAIR Act), the Office of Management and Budget's Circular A-76, and the Federal Acquisition Regulation (FAR).⁶ The Congressional Research Service reported that as of March 2011 the DOD was utilizing more civilian contractors in Afghanistan and Iraq (155,000) than military personnel (145,000). Civilian personnel made up 52% of the Department of Defense's deployed workforce, with the number of civilian personnel supporting Afghanistan exceeding that of Iraq during 2011.⁷ The increased roles and responsibilities of the civilian workforce include but are not limited to logistical support, construction, technical assistance, maintenance and repair services, facilities operations support, program management support, and private security contract support. These roles and responsibilities occasionally require civilians to deploy into areas of armed conflict, wear uniforms, and openly carry weapons.⁸

GENEVA CONVENTIONS

The International Humanitarian Law (IHL), also known as the Law of Armed Conflict, or Law of War, defines the conduct and responsibilities of nations and individuals while conducting warfare. More importantly, the IHL intends to protect individuals who are non-combatants (civilians) or who have surrendered. A majority of the IHL is comprised of the four Geneva Conventions of 1949 and three supplemental agreements known as the Protocols

I and II of 1977 and Protocol III of 2005. The First Geneva Convention safeguards those who are *hors de combat* (outside the fight) such as the wounded, the sick, downed pilots, and detainees. Subsequently, the Second Geneva Convention further expands upon the first by increasing the safeguards to members of the armed forces at sea. The Third Geneva Convention establishes specific rules for the treatment of prisoners of war (POW). Finally, the Fourth Geneva Convention attempts to protect civilian personnel in times of war. The three supplemental agreements discuss victims of international and non-international armed conflict, and the adoptions of additional distinctive emblems for medical and religious personnel.⁹ By 2000, with the exception of the protocols, 194 nations adopted the four Geneva Conventions.¹⁰

The applicability of the Geneva Conventions hinges on the difference between combatants and civilians. While the Geneva Conventions never formally defines the term civilian, they do routinely utilize the broader term of protected persons. Article 3 of the 1949 IV Geneva Convention defines protected persons as those “taking no active part in the hostilities,” which included, “prisoners of war, wounded and sick combatants, detainees and internees, and all others in the hands of the enemy.”¹¹ In an attempt to refine the definition of protected personnel, Article 4 of the IV Geneva Convention more narrowly defines protected personnel as anyone who finds themselves, “...in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”¹² In essence, a protected person becomes anyone who “...finds themselves in the hands of an enemy of a different nationality.”¹³ Unfortunately, Article 4 of the IV Geneva Convention left many questioning whether everyone who was not in the hands of an enemy of a different nationality was to be distinguished as a combatant. Article 13 of the IV Geneva Convention provides

additional clarity to the aforementioned issue by stating that protected persons were all “populations in the countries of conflict.”¹⁴ The definition of protected personnel throughout the Geneva Conventions is ambiguous and as such, the commentaries of the Geneva Conventions attempt to “...produce a distinction that did not exist at the time they [Conventions] were written.”¹⁵

As established, the Geneva Conventions do not provide a finite definition of a civilian, but the commentaries substantiate that civilians are those who “‘by definition do not bear arms,’ are ‘outside the fighting,’ and ‘take no active part in the hostilities.’”¹⁶ Furthermore, Article 4 of the III Geneva Convention permits civilians to “accompany the armed forces without actually being members thereof.”¹⁷ Examples provided in Article 4 of the III Geneva Convention include civilians who are, “...military aircraft crews, war correspondents, supply contractors, members of labor units or services responsible for the welfare of the armed forces.”¹⁸ As such, an individual loses the distinction of civilian as soon as he or she takes an active part in hostilities. Unfortunately, the Geneva Conventions do not clarify an “active part” or the extent to which a civilian can participate in military operations prior to being designated an active participant.

ACTIVE / DIRECT PARTICIPATION IN HOSTILITIES

Today’s war differs from 1949, and it has become more difficult to distinguish between combatants and civilians. Due to extended military operations in non-declared warfare, and the increased utilization of civilians, the international community has emphasized the importance of defining an active or direct participation in hostilities. Having an international mandate to clarify international humanitarian law, the International Committee of the Red Cross (ICRC) took the lead on the issue. The ICRC held five informal meetings with various legal experts between

2003 and 2008. The ICRC and its legal experts from around the globe studied the issue of direct participation in hostilities for six years before publishing “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” in 2009. The author and a legal expert in international law, Dr. Nils Melzer, consolidated the legal opinions of the international community and provided specificity to the concept of an active or direct participant in hostilities.¹⁹ It is important to note the views in the ICRC document are solely that of the ICRC and merely their interpretation of existing laws. These views are only legally binding through State agreements or State practice wherein a legal precedence is established on a particular issue.²⁰

ICRC Definition of a Direct Participant

According to Article 50 of Protocol I of the Geneva Conventions, civilians are, “...all persons who are neither members of the armed forces of a party to the conflict nor participants in *levée en masse* [the defense of a nation by all].”²¹ As previously noted, civilians may accompany military personnel, but lose the status of civilian as soon as they directly participate in hostilities. The direct participation in hostilities refers to “...specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.”²² Additionally, the IHL defines the term hostilities as, “...the resort to means and methods of ‘injuring the enemy’, and individual attacks as being directed ‘against the adversary.’”²³ For an act to be hostile, it must satisfy three tests:

1. ...the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. ...there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

3. ...the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)²⁴

According to the first criterion, a hostile act seeks to harm military operations or readiness. In the absence of adversely affecting military operations, the first criterion can be met by inflicting death, injury, or destruction on persons or objects protected against direct attack. According to the IHL, attacks are defined as “...acts of violence against the adversary, whether in offence or in defense.”²⁵ As such, any act affecting military operations or of violence will meet the first criterion. Examples of the ICRC include clearing adversarial mines, computer network attacks (CNA), and computer network exploitation (CNE). Per Dr. Melzer, in the absence of military harm, the most uncontroversial examples of a direct attacks are, “...attacks directed against civilians and civilian objects.”²⁶

The second criterion requires that the hostile act will likely cause actual harm (direct causation). Indirectly causing harm does not meet the second criterion, for it would categorize anyone remotely involved in the war effort as direct participants in hostilities. Some examples of war-supporting activities causing indirect harm include food production, transport, and scientific research. In general, an act meets the second criterion if it can cause harm through the execution of a single step, such as firing a weapon. If the act is likely to cause actual harm, then it is subject to the third and final criterion.²⁷

The third and final criterion requires the act to be specifically designed and executed on behalf of a “party to an armed conflict” and to the “detriment of another.”²⁸ For example, civilians can cause harm to others in self-defense, and that action would not meet the third criterion because the act seeks to defend oneself and not a belligerent nexus. If the act meets the requirements for the threshold of harm, direct causation, and belligerent nexus, then the

individual executing the act is a direct participant in hostilities.²⁹ Individuals directly participating in hostilities cease being civilians and lose their protection against direct attacks for the duration of their participation. If direct participation in hostilities on behalf of a party to the conflict continues, then the individual is classified as a member of the armed group and loses protection against a direct attack altogether.³⁰

WHY USE CIVILIANS

The utilization of civilians instead of military personnel provides various advantages in the realms of cost, speed, technical expertise, continuity, and flexibility.³¹ In regards to speed, corporations are able to locate and hire civilians with existing certifications and deploy them into a combat environment much quicker than United States military forces. More importantly, the deployment of civilians into a combat environment minimizes the political and public scrutiny that is inherent during the deployment of military units.³²

In addition to speed, civilians also provide technical expertise not organic to the United States armed forces. Armed conflicts of the twenty-first century utilize advanced technology that requires a lifetime of experience and extensive subject matter expertise to operate and maintain. Unfortunately, limited resources, the military promotion structure, and a twenty-year retirement eligibility hinders the ability of the United States military to develop and maintain some of the technical expertise required of twenty-first century armed conflict, and makes it dependent on outside civilian resources.³³

Continuity of operations is another advantage gained by utilizing civilians in armed conflicts. Unlike the United States military, civilians have the flexibility to negotiate their contract and duration of deployment. As such, a United States service member may rotate out of theatre after completing a six to twelve month deployment while a civilian can remain deployed

for an extended period as defined by the contractual agreement. The extended duration of deployment assists in providing the inbound military unit with additional continuity and historical/cultural perspective.³⁴

Finally, civilians provide the United States military flexibility. It would be improper to portray the United States military as an organization technically inefficient and completely dependent upon non-military expertise. In fact, a majority of civilians support non-technical positions in order to ensure the greatest use of military personnel in combat. Some of these support functions include laundering, cooking, administrating, maintenance, and transportation. Furthermore, the United States military gains additional flexibility at the end of combat operations because it can send civilians home without a concern for retirement, pensions, placement, or medical care. Speed, technical expertise, continuity, and flexibility are advantages gained by using civilians, and as such, civilians will always remain a participant in combat operations.³⁵

COMMAND AND CONTROL

While the use of civilians in a combat environment provided a number of advantages, it also had one significant disadvantage: Military organizations had no authority over civilians accompanying them during combat operations, which resulted in a lack of accountability for the actions of civilians. During the 2008 presidential campaign, Senator Hillary Clinton made the use of civilians in combat operations and the lack of authority over them a political issue. Astonishingly enough, the lack of authority over civilians did not stem from poor leadership but rather from a legal issue associated with the traditional Articles of War, which governed accompanying civilians until 1950. The Articles of War stated, "... all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and

without the territorial jurisdiction of the United States” were subject to the Articles of War.”³⁶ In replacing the Articles of War in 1950, the Uniform Code of Military Justice (UCMJ) was established to govern “... persons serving with or accompanying an armed force in the field” in time of war or peacetime.³⁷ Shortly thereafter, the United States Supreme Court rejected the notion that the military could have court-martial-jurisdiction of civilians during periods of peacetime. Furthermore, the Supreme Court interpreted a time of “war” to mean that Congress had to provide a formal declaration of war, which had not happened since World War II. The rulings of the Supreme Court left the military limited in any potential punitive actions against civilians. The only option the military had was to remove the civilian from the combat environment while all other punishments were subject to the discretion of the parent company.³⁸

In 2000, Congress passed the Military Extraterritorial Juridical Act (MEJA). Under MEJA, Department of Defense contractors who had committed a felony under United States law would return to the United States and be prosecuted by the Department of Justice. Unfortunately, attempting to prosecute a case with stateside prosecutors and the difficulties inherited by an evidentiary process in an overseas combat environment was too difficult and as such, MEJA had a minimal impact. For example, the Department of Justice attempted to utilize MEJA for prosecuting the Abu Ghraib scandal in 2004 but failed miserably because the two contractors (an interrogator and a translator) worked for the Department of Interior and not the Department of Defense. The employee/employer technicality shielded the two contractors from prosecution and the case evaporated. After witnessing the ineffectiveness of the Department of Justice executing MEJA, Congress revised the UCMJ in 2007 by modifying Article 2(a) (10) and adding, “...in time of declared war *or contingency operation*.”³⁹ By adding the clause, “...or contingency operation,” the armed forces were granted court-martial jurisdiction over

accompanying civilians during any military operation regardless of whether Congress had declared a state of war.⁴⁰ In June of 2008, the military exercised its new authority over accompanying civilians by successfully prosecuting an Iraqi interpreter who had stabbed his coworker while in Iraq. The accused civilian eventually pled guilty and received five-months of confinement.⁴¹ While the United States military has gained greater control over its accompanying civilians through the revision of the UCMJ, the notion of uncontrolled contractors still exists among the public.

TWENTY-FIRST CENTURY WARFARE

The nature of war remains the same but its characteristics continuously change. The fight against terror is transitioning from the traditional large ground forces initially seen in Iraq and Afghanistan, to small and elite Special Operations Forces. Precision strikes from Unmanned Aerial Vehicles (UAV) replace traditional artillery and carpet-bombings. Information technology specialists sit behind multiple computer monitors, thousands of miles away, and conduct cyber warfare against adversaries in a domain unimaginable in the early twentieth century. Additionally, more civilians support military operations today than ever before. Developmental changes in technology and capabilities are the reasons armed conflicts of the twenty-first century appear very different from those of the previous century.

Cyber Warfare

The Department of Defense defines cyberspace as, “A global domain within the information environment consisting of the interdependent network of information technology infrastructures, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers.”⁴² Cyberspace and the technologies that facilitate it, has provided society a means to communicate instantaneously with others through email, video

conferences, voice over Internet Protocol (IP (VoIP)), and media websites. Telephones transitioned to cell phones and smart-phones while providing access to anyone in cyberspace. International and domestic banking transactions traditionally took days to execute, but now only require the stroke of a single key. Organizations such as the government or the media are able to disseminate information instantly to their audiences through radio, satellite radio, websites, cellular towers, satellite television, and cable television. A third of the world's population utilizes the internet with over four billion digital devices and the number of users only continues to grow.⁴³

While cyberspace and its digital infrastructure can empower whole societies, it can also destabilize and undermine a society if used maliciously.⁴⁴ In fact, the *2010 National Security Strategy* states, "Cybersecurity threats represent one of the most serious national security, public safety, and economic challenges we face as a nation."⁴⁵ Consequently, the Department of Defense's awareness of cyber threats has led it to treat cyberspace as its own operational domain, much like air, land, and sea.⁴⁶ In cyberspace, cyber warriors conduct cyber operations. The Department of Defense defines cyber operations as, "The employment of cyber capabilities where the primary purpose is to achieve objectives in or through cyberspace. Such operations include computer network operations and activities to operate and defend the global information grid (GIG)."⁴⁷ Without question, the United States views cyberspace and the technologies that enable it as critical infrastructure. According to the 2011 *International Strategy for Cyberspace*, any malicious cyber attacks against the United States are considered a threat to national security. As such, the United States reserves the right "...to use all necessary means – diplomatic, informational, military, and economic [DIME] – as appropriate and consistent with applicable international law, in order to defend our Nation, our allies, our partners, and our interests."⁴⁸

One of the first examples in which cyberspace became its own operational domain was the Russian-Georgian War. In 2008, Russia and Georgia went to war over the disputed South Ossetia territory which had been taken from Georgia in the 1992 South Ossetia War and the 1993 Abkhazian War. Georgia initiated military operations against South Ossetia on 7 August 2008 to which Russia counterattacked Georgian territories with aerial bombardments and cyber operations. Russia's mechanized forces quickly defeated the Georgian military and within a week, both Russia and Georgia signed a ceasefire agreement. While the war seems insignificant to those unfamiliar with the region, it was unique because it was the first war wherein cyber operations were coordinated in an attempt to dominate the cyberspace domain.⁴⁹

While Russia was never definitively linked to the cyber attacks, many believe that Russia was responsible for the cyber attacks on Georgia due to the coincidental timeliness between the cyber attacks and Russia's attacks on the other three conventional domains. Additionally, some of the cyber attacks directed towards Georgia contained the message, "win+love+in+Russia."⁵⁰ Russia allegedly started executing cyber attacks against Georgia's military and government networks three weeks prior to the Georgian – Russian confrontation. First, Russia attacked a popular hacker forum in Georgia with hopes of denying Georgian hackers the ability to retaliate. The attempt to prevent cyber counterattacks was successful in limiting, but not eliminating, any retaliatory attacks by Georgian hackers. Interestingly, the Russian hackers were primarily "...patriotic amateur hackers, cyber militias, and organized criminal gangs."⁵¹ Even more impressive was the ability of these civilian hackers to organize, prepare, execute, and align their actions with the strategic objectives of Russia. After attacking the Georgian hackers, Russia hackers continued its attacks by various means to include distributed denial of service (DDOS) attacks on 54 websites related to communication, finance, and the government.⁵² Russia

demonstrated that it could disrupt utility services such as power, water, or oil but deliberately chose not to attack those critical infrastructure nodes because it were counterproductive to Russia's strategic goals. As heavy mechanized Russian forces moved into Georgia, cyber attacks peaked. The Georgian government and military was unable to communicate internally or externally. Consequently, Georgia could not provide situational awareness to the rest of the world or its own people. Georgia was isolated from the world in a fight against Russia and its people. As a result, its military lacked direction, was unaware of current events, and was confused.⁵³

The 2008 Russian-Georgian War demonstrated that cyberspace is an effective warfighting domain. Since then, in 2009, the United States established a unified functional command known as Cyber Command (USCYBERCOM) with the mission of defending specified Department of Defense communication and information systems. Additionally, the Department of Defense relies heavily on its National Security Agency to defend the United States from attacks against its communication and information systems. Many of the cyber professionals in the Department of Defense and its National Security Agency are civilians, which leads one to ask whether civilian cyber professionals are direct participants in hostilities while conducting cyber attacks to disrupt the command and control (C2) capabilities of another military force during armed conflict. They are direct participants in hostilities. Disruption of another military's C2 capabilities clearly harms the military and therefore meets the first ICRC guideline for distinguishing a direct participant in hostilities. Again, an individual must meet all three cumulative ICRC criteria to be a direct participant in hostilities. The cyber professionals meet the second ICRC criterion because their direct actions resulted in the degraded C2 capabilities of the opposing military forces. Finally, the cyber professional must act on behalf of, or in support

of a party to the conflict. In the situations outlined above, the Department of Defense employed the cyber professional to harm a belligerent nexus. According to the ICRC guidelines, by meeting all three criteria, (1) threshold of harm, (2) direct causation, and (3) belligerent nexus, the civilian cyber professional loses the status of civilian while conducting cyber attacks on behalf of the United States.⁵⁴ If cyber professionals continuously participate in cyber attacks, then they also assume a “continuous combat function” and therefore could permanently lose the status of civilian and become lawful targets.⁵⁵ The intent of the “continuous combat function” is to delegitimize those who are “farmers by day and fighters by night.”⁵⁶ Undoubtedly, cyberwarfare has and will continue to blur the lines between civilian and combatants in future combat operations.

Unmanned Aerial Vehicles (UAV)

Besides cyber warfare, the use of armed UAVs by the Central Intelligence Agency (CIA) has also raised legal concerns regarding the use of UAVs and those who operate them. The Department of Justice argued in a white paper that “...the U.S. government could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen [or anyone] who is a senior operational leader of al-Qa’ida or an associate force of al-Qa’ida – that is, an al-Qa’ida leader actively engaged in the planning operations to kill Americans.”⁵⁷ The Department of Justice further argued that the President has the authority under United States and international law to target “...a member of an enemy force who poses an imminent threat of violent attack to the United States.”⁵⁸ Finally, the Department of Justice stated, “Moreover, a lethal operation in a foreign nation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation’s government or after a determination that the host nation is unable or unwilling to suppress the threat posed by

the individual targeted.”⁵⁹ While the DOJ clearly outlines the legal principles supporting its use of armed UAVs, other experts and organization disagree with the assessment. In fact, it was argued at a House Subcommittee on National Security and Foreign Affairs Hearing that the use of armed UAVs in areas of armed conflict is lawful, but the use of armed UAVs in areas without armed conflict and where the United States is not involved in armed conflict, such as Yemen, Pakistan, Ethiopia, and Somalia, is unlawful.⁶⁰

According to Mary Ellen O’Connell, an International Law Expert and a professional military educator for the United States Department of Defense, the United Nations deems the use of armed UAVs outside of areas of armed conflict unlawful because armed UAVs do not comply with the United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials. The United Nations Basic Principles states that, “Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against imminent threat of death or serious injury... In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”⁶¹ While the United States may view itself as being in an “armed conflict” with terrorist organizations, the International Law Association’s Committee on the Use of Force defines “armed conflict” as, “...[1] the presence of organized armed groups that are [2] engaged in intense inter-group fighting.”⁶² In essence, armed conflict requires intense and continuous fighting which an isolated terrorist attack is not. As such, terrorism, regardless of the aftermath, is not an “armed conflict” but rather a crime. Thus, the use of armed UAVs to target terrorists outside of areas of armed conflict violates U.N. Basic Principles. Outside of specified areas of armed conflict, counterterrorism is a policing matter wherein police do not have the authority to execute citizens unless it is in defense of themselves or others.⁶³ Furthermore, no state can give consent to another state to, “...use military force

against individuals on their territory when law enforcement measures are appropriate.”⁶⁴

Regardless of authorization from another state, the United States cannot lawfully resolve criminal matters by launching Hellfire missiles from UAV platforms in an area with no armed conflict.

To compound the issues already surrounding the use of armed UAVs, the CIA maintains its own UAV program with its own target lists or “kill lists.”⁶⁵ The CIA is primarily a civilian organization that, according to former Secretary of Defense Donald Rumsfeld, has been executing UAV operations prior to 2002, and as an organization was doing, “...a good job.”⁶⁶ While the CIA UAV program is very secretive, a primarily civilian agency, with a primarily civilian chain of command, would probably utilize civilians as UAV operators in lethal operations. Additionally, it makes logical sense to believe that a civilian would authorize an attack on individuals from the pre-approved target list. If the CIA uses civilian UAV operators and a civilian approving authority, would those two individuals retain their civilian status? To answer this question, one must take a number of variables into consideration beyond the three ICRC criteria used in distinguishing a direct participant in hostilities.

First, one must ascertain whether utilization of the armed UAV is lawful under international law. According to some international law experts, the international law permits the use of armed UAVs only in areas of armed conflict where organized armed groups are engaged in intense fighting.⁶⁷ Any use of armed UAVs outside of the areas of armed conflict is unlawful and the Geneva Conventions do not apply because the UAV usage in questions becomes a criminal act. According to the ICRC, the UAV operator and the approving authority would be considered themselves an, “...’armed organized group’ and apparently legally indistinguishable from the terrorists they target.”⁶⁸ Assuming the lawful use of armed UAVs in an area of armed

conflict; one must once again ascertain whether the operators of the UAVs or the approving officials are direct participants in hostilities. Clearly, the launching of a hellfire missile at a designated target meets the ICRC's threshold of harm because of the assassination of the person of interest or the hindrance of an operation. The second ICRC criterion requires a direct causal link between the act and harm. In this instance, the civilian approving authority gives the order to fire a Hellfire missile and the UAV operator responds by launching the missile. Both parties meet the threshold of direct causation and therefore have met the second criterion of the ICRC. Finally, was the harmful act done on behalf of a belligerent nexus? Obviously, the equipment and the CIA employees operate on behalf of the United States, and as a result, the UAV operator and the civilian approving official meet the third ICRC criterion. Having met all three ICRC criteria, both individuals would be directly participating in hostile activities and as such lose their civilian status.⁶⁹ In the scenario described, the lines between combatant, civilian, and an unlawful combatant are hopelessly blurred.

Private Security Contractors

As previously stated, the United States has used contractors in every armed conflict dating back to the Revolutionary War.⁷⁰ Recent armed conflicts in Iraq and Afghanistan publicly exposed the United States' dependency on a growing subset of contractors known as private security contractors (PSC).⁷¹ By March of 2011, 28,000 private security contractors, approximately 18% of all Department of Defense contractors, were responsible for guarding, "...personnel, facilities, or property, and any other activity for which contractors are required to be armed."⁷² To the public, the use of private security contractors in Iraq and Afghanistan remained unknown until a few highly publicized incidents transpired in which private security contractors allegedly murdered civilians or used excessive force.⁷³ The accusations of excessive

force and murder elevated private security contractors into an international spotlight wherein their use and their direct participation in hostilities became controversial.

Apart from criminal behavior, are armed private security contractors direct participants in hostilities? The ICRC methodology for distinguishing a direct participant in hostilities applies as much to private security contractors as it does to the previously mentioned cyber professionals, UAV operators, and their approving officials. As such, private security contractors clearly meet the threshold of harm criterion when using deadly force to guard “...personnel, facilities, or property, and any other activity for which contractors are required to be armed.”⁷⁴ Undoubtedly, private security contractors also meet the direct causation criterion because they execute an act that directly results in the harm or death of a party of the armed conflict. As such, private security contractors meet the first two ICRC criteria with relative ease. The final criterion, the belligerent nexus criterion, is obscure when applied to private security contractors and therefore a little more controversial. As defined by the ICRC, to meet the third criterion of a belligerent nexus, one must, “...meet the required threshold of harm in support of a party to the conflict and to the detriment of another.”⁷⁵ The ICRC has also stated that defending oneself or others does not meet the third criterion because the harm caused was not on behalf of a belligerent nexus but rather on behalf of oneself, and therein exposes the controversy.⁷⁶ Are private security contractors defending themselves or the contractually agreed upon interests of the party to the armed conflict when purposefully placing themselves between critical assets of a party to the armed conflict and opposing members of the armed conflict? While legal scholars have legitimate arguments for both perspectives, private security contractors currently retain their civilian status, but the lines between combatant and civilian are once again blurred.

INTERNATIONAL PERSPECTIVE

While not adopted by the United States, Article 43 of the additional Protocol I states, “The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates... Such armed forces shall be subject to an internal disciplinary system which, *inter alia* [among other things], shall enforce compliance with the rules of international law applicable in armed conflict.”⁷⁷ Article 44 defines a combatant as anyone defined in Article 43 and further stipulates that combatants must “...distinguish themselves from civilians...” and “...carry his arms openly.”⁷⁸ Protocol I attempts to provide additional clarity to the Geneva Conventions. Of all 194 nations, 172 have ratified Protocol I and therefore consider combatants as any group within an organization of command, subject to an internal disciplinary system, wearing a uniform (distinguishing themselves), and carrying a weapon openly.⁷⁹ Regardless of how the United States defines a combatant or civilian, it must consider the perspective of the international community because armed conflicts will most likely be with members of the international community.

CONCLUSION

As established, civilians deploying into an area of armed conflict become a part of the command organization and must adhere to all relevant policies and regulations. The commander has the authority to authorize or mandate the wearing of the host command uniform for civilians.⁸⁰ Additionally, civilians have the right to bear arms for the purpose of self-defense and the USCENTCOM arming policy permits the use of, “...US government-approved weapons such as the M9, M4, M16, or equivalent (E.G., .45 Cal, AK-47)... for personal protection.”⁸¹ At this point, civilians are members of a command organization; they are wearing military uniforms and

openly carrying weapons. Consequently, civilians who do not adhere to the policies or regulations of the host command organization are subject to an internal disciplinary system known as the UCMJ. The 2007 amendment to Article 2(a) (10) of the UCMJ, gives the armed forces court-martial jurisdiction over accompanying civilians during any military operation.⁸² Even if the United States does not agree, 89% of the world's nations have ratified Protocol I, and could logically consider such civilians combatants.⁸³

In addition to the policies and regulations that have civilians resembling the appearance of combatants, civilians are also performing jobs on behalf of parties to an armed conflict that are inherently the functional responsibility of combatants. If an individual commits an act that cumulatively meets the threshold of harm, has a direct causation, and is on behalf of belligerent nexus, then the individual is a direct participant in hostilities and loses his or her protected status as a civilian. While the nature of war has not changed, the characteristics of war have. Private industry provides decades of experience and subject matter expertise for technologically advanced weaponry that is not organic in military organizations. The cyber domain and armed UAVs are just a few of the emerging technologies that have altered the battlefield of the twenty-first century. These functions alone pose serious questions as to the roles and responsibilities of civilians in combat operations. While a civilian directly participating in hostilities does not necessarily become a combatant, it does raise the question as to their status. Are they civilians, unlawful combatants, criminals, or something still undefined?

The dividing line between a combatant and a civilian has lost its distinction due to both the complexities of twenty-first century warfare and to the ambiguities of the 1949 Geneva Conventions. The Geneva Conventions do not clearly define a combatant, a civilian, or a direct participant in hostilities. In fact, some of the protections afforded by the Geneva Conventions

are composed of dated thinking and are prejudicial in nature. The commentaries of the Geneva Conventions identifies, “‘...certain categories that, by definition, take no part in the fighting’ are ‘children, women, old people, the wounded, and the sick.’”⁸⁴ Too many examples exist to discredit the Geneva Conventions’ definition for those who “take no part in the fighting,” but one recently clear example is Defense Secretary Leon Panetta’s 2013 policy allowing women into combat roles traditionally reserved for men. Consequently, in an attempt to provide further clarity to the Geneva Conventions, the international community amended the Geneva Conventions with three protocols. Even with the these three protocols, the Geneva Conventions remain obscure, and the international legal community continues to exhaust countless energy and resources in an attempt to understand them. Resulting from all the exhaustive efforts are numerous legal opinions that contradict one another and permit nation states and combatants to utilize legal opinions that most suit their needs.

The United States could undertake various recourses to delineate a combatant from a civilian in order to minimize the need for interpreting the Geneva Conventions. First, the United States could engage the international community and amend the Geneva Conventions through additional protocols. However, for the amount of effort and energy consumed in ratifying a protocol, a new consolidated Geneva Convention could be rewritten to meet the challenges and needs of twenty-first century warfare. While rewriting and ratifying the Geneva Convention would be extremely difficult due to dependencies on international cooperation and approval, it would probably provide the international community with a more permanent solution to some of its challenges.

Besides rewriting the Geneva Conventions, the United States could make minor changes to its operational methods. For instance, the United States could centralize its UAV program

under the Department of Defense and alleviate any concerns regarding the legal status of CIA operators, approving authorities, or anyone else involved in the program. There is no evidence to suggest that the CIA has a capability or expertise that the Department of Defense does not. Furthermore, while legal scholars continue to argue the legitimacy of using UAVs outside of an area of armed conflict, all seem to agree that a civilian agency should not maintain an armed UAV program. As such, the United States should move the armed UAV program under the Department of Defense and alleviate itself from unnecessary public scrutiny and criticism.

Additionally, United States armed forces should take on all roles and responsibilities in which the use of deadly force is anticipatory. As such, the guarding of personnel, facilities, or property should be the responsibility of armed forces and not civilians. Besides clearly discerning a combatant from a civilian, the use of military forces ensures a unity of effort aligned with the strategic goals of the commander, and ensures consistent application of approved tactics, techniques, and procedures. With this change in operational methodology, scrutiny of the Department of Defense's efforts to guard critical infrastructure or personnel would be limited.

Finally, authorization to wear a military uniform should never be extended to civilians under any circumstance. If the appearance of civilians is unsatisfactory to the commander, then he or she should establish a policy focused on a dress code. The military uniform has the ability to differentiate a combatant from a civilian with relative ease. Why expose the civilian to unnecessary risk when the wearing of uniforms, or lack thereof, has no impact on military operations?

In summary, while not all-inclusive, the recommendations above would improve the ability to differentiate combatants from civilians. As evident, increased roles and responsibilities

of civilians in armed conflicts is dangerously blurring the lines between civilians and combatants. Consequently, the Geneva Conventions' definition of a lawful combatant and civilian is obscure and left to the interpretation of legal experts. If legal experts throughout the international community cannot come to a consensus regarding the Geneva Conventions, then how can combatants be expected to apply the laws of war in split-second decisions during the fog of war? More importantly, how can anyone guarantee or even expect uniformity in the application of the laws of war? Updating the Geneva Conventions and improving the methods of operations for the United States are imperative if the United States does not want other countries to imitate it by executing hostile acts, justified by their interpretations of international law.

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- ⁸³ "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I)," *International Committee of the Red Cross (ICRC)*, accessed 7 February 2013, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>.
- ⁸⁴ Kinsella, 120.

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